

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

RITE AID OF NEW YORK, INC., AND RITE
AID OF NEW JERSEY, INC.,

Respondents,

-and-

1199SEIU UNITED HEALTHCARE
WORKERS EAST,

Union.

Case No. 02-CA-160384

**RESPONDENTS' REPLY BRIEF IN OPPOSITION TO THE UNION'S ANSWERING
BRIEF**

This case is about good faith bargaining. 1199SEIU United Healthcare Workers East (the “Union”) demanded a \$35 million increase in the cost of bargaining unit associate medical benefits. In return, Rite Aid of New York, Inc. and Rite Aid of New Jersey, Inc. (collectively, “Rite Aid”) sought an offset to that cost. Rite Aid proposed a transfer of work to allow for a much-needed increase in supervision at its New York pharmacies. The Union refused to bargain and provided no acceptable alternative cost offsets. The factual and legal errors throughout the Union’s Answering Brief exposes the Union’s true intention -- to force a contract through litigation rather than through good faith bargaining. For the reasons described below, as well as in Rite Aid’s initial brief, Administrative Law Judge Davis’s Decision (“ALJD”) is erroneous and should be reversed.

I. The Union Has No Factual Basis for its Claim That Rite Aid's Proposal is a Sham

The Union principally argues that Rite Aid's transfer of work proposal (the "Proposal") is a sham. It alleges that Rite Aid never intended the Proposal to transfer bargaining unit work until the hearing before Administrative Law Judge Davis ("ALJ Davis"). To prove its claim, the Union makes a series of increasingly bizarre and untrue statements about bargaining. Its argument does not pass the laugh test.

The Union claims Rite Aid's failure to utter the magic words "transfer of work" invalidates the Proposal. Rite Aid confesses that it did not negotiate in Board legalize. Rite Aid instead explained the Proposal for future staff pharmacists to be "leading their stores and undertaking supervisory responsibilities" (ALJD 3:26-30). Rite Aid explained throughout bargaining that "our business managers are [pharmacists], they should be managing team and leading initiatives." (GC 16 at RA000630). Rite Aid emphasized that future staff pharmacists should "properly be engaged in management and supervisory responsibilities." (Jt. Exh. 19). Rite Aid couched the Proposal specifically in terms of assigning work responsibilities and supervisory functions – in short, as a transfer of work in all but name.

The Union describes Rite Aid's references to supervisory job responsibilities as "casual, passing statements." This is a bold claim, given that Rite Aid *introduced the Proposal* by talking about the need for additional supervisors at its pharmacies. (ALJD 3:26-30). Perhaps if the Union had asked questions during bargaining, or done more than outright reject the Proposal and move on, Rite Aid would have had the opportunity to offer more explanation and there could have been more in-depth discussions between the Parties. But according to the Union's own Answering Brief, the Union immediately characterized the Proposal as a "nonstarter" and refused to discuss

it. However, neither Party needed additional information on the role of supervisory staff pharmacists because the Union represents associates in New Jersey where all pharmacists are management. Indeed, the ALJ heard testimony on the differences between supervisory and non-bargaining unit pharmacists at these different locations (though he inexplicably, and without comment, ignored this testimony). (ALJD 3:fn. 1).

The Union similarly claims that Rite Aid never referenced the supervisory job duties of pharmacy interns, and never contemplated that they would serve as supervisors. Again, the Proposal plainly mimicked the bargaining unit structure of New Jersey, where neither staff pharmacists nor interns were part of the bargaining unit. The Union simply never asked about the job responsibilities of interns. Notably, the Union does not cite to the ALJ's Decision, or any definitive statement by Rite Aid during the negotiations or the hearing, to support its contention that Rite Aid never contemplated that interns would serve as supervisors.

The Union next chastises Rite Aid for not correcting the Union's characterization of the Proposal as a change in the scope of the unit. This is not true. On November 19, Allyson Belovin told Rite Aid, "You are asking to change the scope of our bargaining unit." (GC 16 at RA000645). Traci Burch immediately replied "Pharmacists should be functioning as management in stores." *Id.* Rite Aid did not respond with citations to Board law to rebut the Union's incorrect legal assertion on the nature of the Proposal, but Rite Aid provided a valid business management explanation for transferring bargaining unit work out of the unit.

The Union also claims that, on December 15, 2015, Traci Burch explicitly acknowledged that Rite Aid wanted to "bargain over the scope of the bargaining unit." Again, *this is not true*. It *is* true that Allyson Belovin testified that Ms. Burch made this comment. It is also true that Gordon Hinkle testified that Traci Burch did not speak of the Proposal in this way. (Tr. 202). But more

importantly, ALJ Davis did not make a finding of fact on this claim, it played no role in his Decision, and the Union's reliance on it is misplaced.

The Union argues that Rite Aid did not seek to clarify the Proposal after the Union filed its unfair labor practice charge. The ALJ notes, as Rite Aid has already described above, that on November 19, 2015, Traci Burch corrected the Union's assertion that the Proposal modified the scope of the bargaining unit, and stated that Rite Aid "simply wanted its pharmacists to take on additional roles." (ALJD 11:1-2). The ALJ similarly found that Rite Aid sent the Union a letter which explicitly stated that Rite Aid was "not seeking to modify the scope of the bargaining unit to exclude pharmacists or pharmacy interns." (ALJD 13:21-25).

The Union offers one final argument in which it misconstrues Rite Aid's position statements submitted to the Region in response to the Union's unfair labor practice charge. Rite Aid made an argument in the alternative in its November 23, 2015 position statement – a common legal practice. Rite Aid began that position statement by stating "Even when taking the Union's factual allegations as true..." before launching into a discussion about how Rite Aid could insist, hypothetically, on a permissive subject of bargaining. (GC 21). Rite Aid then responded on January 25, 2016 to the Region's request for a position on 10(j) by continuing to accept, for the sake of argument, the premise that the Proposal was permissive. (GC 22). This is not proof of anything; this is a legal argument made pursuant to a request from the Region. The ALJ did not rely on Rite Aid's position statements, or mention them in his Decision, and the Union's reliance is misplaced.

The Union's arguments reveal much about the context of negotiations. Rite Aid attempted, repeatedly, to explain the Proposal and the need to adapt to the changing pharmacy industry. The

Union responded by sticking its head in the sand and hoping that litigation before the Board would force Rite Aid to acquiesce to its bargaining demands.

II. The Proposal Does Not Just Reclassify Bargaining Unit Associates

Although its sham argument is based on a gross misreading of the Record, the Union persists in its belief that Board law also supports its position that Rite Aid merely reclassified the staff pharmacist and pharmacy intern classifications. The Union maintains that the duties of non-unit staff pharmacists and pharmacy interns are “admittedly exactly the same.” Rite Aid did not “admit” any such thing. In fact, the Record demonstrates that the Union was well-aware of the different job responsibilities for non-unit staff pharmacists and interns, as well as the reason for Rite Aid’s proposed changes. The ALJ found that:

- Rite Aid’s inability to supervise its associates “could be very disruptive to the pharmacy’s workflow” because Rite Aid pharmacies were unsupervised for days at a time. (ALJD 3:fn 1)
- The Proposal was part of a nationwide effort to make pharmacists more involved in management. (ALJD 3:39-41)
- Rite Aid’s recent transition to a wellness-centered pharmacy is hampered by its inability to initiate new programs without adequate supervision (ALJD 3:31-39)
- Rite Aid introduced the Proposal by stating that Rite Aid intended for pharmacists to be “leading their stores and undertaking supervisory responsibilities” (ALJD 3:26-30).

The Union was fully aware of the above issues, and Rite Aid’s nationwide effort to transfer pharmacist job duties outside of the bargaining unit to newly hired supervisors (ALJD 3:39-42). The Union cannot argue that it was oblivious. The Union represents Rite Aid associates in both New York and New Jersey. In New Jersey, Rite Aid staff pharmacists are supervisors and part of management. The ALJ heard testimony from a New Jersey staff pharmacist that, unlike New York staff pharmacists, New Jersey staff pharmacists are “involved with hiring, firing, disciplining and directing other pharmacy employees, and also act as managers in dealing with

‘wellness initiatives’ including counseling of patients, handling customer issues, scheduling, performing outreach into the community and medical therapy management...” (ALJD 3:31-36). The Union could not possibly be ignorant of these additional job responsibilities.¹

Given the above, the Board cannot support ALJ Davis’s decision to distinguish Rite Aid’s case from the employer in *Bridgeport and Port Jefferson Steamboat Co.*, 313 NLRB 542 (1993) by finding that Rite Aid did not show an “actual, demonstrated need” for a transfer of work. Rite Aid demonstrated that the pharmacy industry has changed and requires more management in its stores. The Parties knew going into negotiations that Rite Aid wanted its New York staff pharmacists to perform the same job responsibilities done by supervisory Rite Aid pharmacists throughout the country. The ALJ simply has no basis to question Rite Aid’s business decision, and the Union provides no reason for him to do so.

III. The Union’s Focus on the Potential Elimination of Bargaining Unit Positions Ignores Relevant Caselaw

The Union contends that the Proposal is permissive because, over time, it might eliminate bargaining unit positions. Citing *Nexstar Broadcasting Group, Inc.*, the Union claims that the Proposal would illegally “sever the link between a recognizable group of employees and its union” and thereby undermine the collective bargaining unit. 363 NLRB No. 32, slip op. at 11 2015. However, the elimination of a bargaining unit position is irrelevant to the analysis of whether or not the Proposal is a permissive or mandatory subject of bargaining.

As the U.S. Court of Appeals for the District of Columbia recently held, in a decision ignored by the Union and the ALJ, focusing on the end result of the proposal is a “red herring.”

¹ The Union has also been concerned about the supervisory status of staff pharmacists since 2009. In 2009, the Union proposed language in the Parties’ collective bargaining agreement forbidding Rite Aid from filing a unit clarification petition to remove the staff pharmacists from the bargaining unit. (Tr. 120).

Aggregate Industries v. NLRB, 824 F.3d 1095, 1100 (D.C. Cir. 2016). When, as here, the bargaining unit is defined in terms of job classifications, the employer need not obtain the consent of the union before transferring work, even if the result reduces the number of bargaining unit positions.

Likewise, the Union’s reliance on *Antelope Valley Press*, 311 NLRB 459 (1993) is misplaced. In *Antelope Valley Press*, the bargaining unit was defined in terms of work performed, not job classifications. In that scenario, a change in the unit description altered the work performed by the bargaining unit, and therefore raised questions about whether employees performing that work were still in the bargaining unit. No such ambiguity exists here. In Rite Aid’s situation, the bargaining unit is defined in terms of specific job classifications. The Proposal merely codifies that newly hired staff pharmacists will be hired as supervisors, and therefore excluded from the bargaining unit. This is not a significant change from the current language – supervisors are already excluded, and staff pharmacists and interns are not specifically included in the bargaining unit. Rite Aid is not calling into question the composition of the bargaining unit by excluding future supervisors. The Parties bargained over bargaining unit work.

IV. Rite Aid Conditioned Agreement on an Offset to the NBF, Not on Transfer of Work

The Union also relies on the Board’s holding in *Smurfit-Stone Container* that an employer illegally insists to impasse on a permissive subject when “agreement on the mandatory subjects of bargaining [was] conditioned on agreement on the nonmandatory subject of bargaining.” 357 NLRB 1732 (2011). Under this view, whether or not the Parties were at impasse is irrelevant; if Rite Aid told the Union that no agreement could be reached without inclusion of the Proposal, then Rite Aid instantly committed a ULP. This did not happen – Rite Aid never made the Proposal an ultimatum, or the “price of an agreement.” *Id.* at 1736. Instead, Rite Aid made the agreement

contingent on an offset to the cost of the 1199SEIU National Benefit Fund (“NBF”). The NBF, not the Proposal, was at all times the focal point of negotiations.

Tellingly, the Union’s entire Answering Brief fails to mention the 1199SEIU National Benefit Fund (“NBF”), the single issue which dominated negotiations. The Union insisted on Rite Aid accepting the NBF as-is. Rite Aid sought an offset to the enormous \$35 million increased cost to the NBF. Rite Aid informed the Union that it could not agree to the NBF without a cost offset. (ALJD 8:49-52). While the Proposal addressed supervisory concerns, discussed above, it also provided an economic offset to the dramatic increase in cost of the NBF. Rite Aid proposed its package of business initiatives, including the Proposal, as a potential offset. The Union failed to supply an acceptable alternative, so Rite Aid continued to press its business initiatives as the only available option at the moment. Rite Aid was not going to bargain against itself. The condition precedent for an agreement was an offset to the cost of the NBF, not the Proposal.

Despite this, the Union attempts to paint bargaining as centered exclusively on the Proposal. This is not the case. For instance, the Union notes that Rite Aid stated that the Proposal “was tied directly into the economics.” (Tr. 69-70). Indeed, as the ALJ notes, Rite Aid then immediately went on to explain that the Proposal sought to “save money to offset the cost of the [NBF]...” (ALJD 3:14-17). The Union then takes issue with Rite Aid’s supposed failure to reassure the Union that the Proposal would be withdrawn if the Union offered a different economic offset. This proves nothing. Rite Aid is not obligated to reassure the Union or bargain with itself and, more importantly, the Union never actually offered an offset in cost despite Rite Aid repeatedly requesting it to do so.

The Union further relies on Rite Aid’s statements on August 11, 2015, that it was difficult to respond to the Union’s proposal which did not address Rite Aid’s business initiatives. The

Union omits that Traci Burch began the session by again reminding the Union that Rite Aid “needed something to offset [the NBF’s] expense.” (ALJD 8:49-51). Later, the Union states that Rite Aid explicitly made a deal contingent on all three of its business initiatives on November 17, 2015. It ignores the fact that, just a few sessions later, Rite Aid clarified that “[t]he union has not provided support on our business initiatives, we are wondering what other options do we have like NBF.” (GC 16 at RA000648).

The Record indicates that Rite Aid gave an ultimatum to the Union over the NBF, not the Proposal. Rite Aid’s message at all times was that there needed to be an offset to the NBF. The Union never proposed an adequate offset, so Rite Aid, in the absence of any other proposal, continued proposing the Proposal because it was not going to bargain against itself.

V. The Union Falsely Claims an Impasse Existed

The Union argues that, even if Rite Aid did not explicitly condition agreement on a permissive subject of bargaining, the Parties were at a “deadlock” in negotiations. Under *National Fresh Fruit & Vegetable Co. & Quality Banana Co.*, a party which insists on a permissive subject of bargaining to the point of an overall impasse commits an unfair labor practice. 227 NLRB 2104 (1977). Even assuming, *arguendo*, that the Proposal is a permissive subject, the Union provides no citation to the Record for this claim of an overall impasse, because none exists. The Counsel for the General Counsel admitted during the first day of the hearing that no impasse existed and “bargaining continues.” (Tr. 32).

The Union claims that *District 50, United Mine Workers of America* supports its position that “good faith bargaining never gets started” when an employer repeatedly brings up a permissive subject in the face of a union’s repeated rejection of the proposal. 142 NLRB 930, 939 (1960). Yet the Record demonstrates that good faith bargaining “got started” and continued, even though

the Union rejected the Proposal. The Parties reached agreement on a wide range of topics. (ALJD 10:34-43). At many negotiation sessions, the Proposal was not even discussed. The Union cannot argue that the bargaining between the Parties resembles the clear impasse reached in *District 50*.

The Proposal played an important role in negotiations, but it was not the only issue, or even the most critical one. Rite Aid engaged in good faith bargaining in an effort to reach an overall agreement. The Union's insistence on Rite Aid's \$35 million increased payment to the NBF forced Rite Aid to search for an offset. Although the Parties could not reach an agreement on this offset, they continued to bargain for months and find agreement elsewhere. The Union's argument that the NBF played no role in negotiations, or that the Parties reached an overall impasse, is a gross mischaracterization of bargaining.

VI. Conclusion

As described above and in Respondents' Brief in Support of Their Exceptions to the Decision of the Administrative Law Judge, the Board should reverse the ALJ's Decision and dismiss the Complaint.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by electronic mail on this 14th day of April, 2017 to the following:

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